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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 HAROLD KING,

4 Plaintiff,

5 v.

20 Civ. 1784 (VSB)
Remote Proceeding

6 FEDCAP REHABILITATION
7 SERVICES, INC., et al.,

8 Defendants.

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9 New York, N.Y.
10 May 12, 2021
2:15 p.m.

11 Before:

12 HON. VERNON S. BRODERICK,

13 District Judge

14 APPEARANCES

15
16 LEE LITIGATION GROUP, PLLC
Attorneys for Plaintiff

17 BY: C.K. LEE

18 EPSTEIN BECKER & GREEN, P.C.
Attorneys for Defendants

19 BY: JEFFREY H. RUZAL
20 ADRIANA S. KOSOVYCH
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1 (Case called; The Court and all parties appearing
2 telephonically)

3 THE COURT: Let's go on the record.

4 I ask first, beginning with plaintiff's counsel, for
5 counsel to please identify themselves for the record. And
6 please remember when you do speak, please state your name first
7 so that we can make sure that we have an accurate record. And,
8 in addition, when you are not speaking, I ask that you try and
9 mute your phone so that we can make sure that we don't have any
10 background noise interfering with the transcription.

11 For the plaintiff?

12 MR. LEE: It is C.K. Lee. Good afternoon, your Honor.

13 THE COURT: Good afternoon.

14 For the defense?

15 MR. RUZAL: Jeff Ruzal and Adriana Kosovych for
16 Epstein, Becker & Green. Good afternoon, your Honor.

17 THE COURT: Good afternoon.

18 Now, I asked for this conference in part to figure out
19 exactly what was going on. I know that the parties had
20 initially, there was a submission of a dismissal pursuant to
21 Rule 41. I think I issued an order inquiring about whether or
22 not there was in fact a settlement. I understand that the
23 parties had been engaged in settlement negotiations but things
24 have fallen through and I think, from the last communication,
25 my understanding is, Mr. Lee -- that plaintiffs -- that at

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1 least on the terms that had been discussed, plaintiffs wished
2 to proceed with the litigation and are no longer interested in
3 the settlement under the terms I guess the parties had
4 discussed.

5 Is that an accurate description?

6 MR. LEE: That's right, your Honor.

7 THE COURT: Okay.

8 And is there anything -- and again, I don't know what
9 the specific issues were or terms that may have been in dispute
10 but is there any -- would there be any usefulness to having the
11 parties either go before a magistrate judge or the Court's
12 mediation program to try and work out whatever those
13 differences were?

14 Let me first ask, Mr. Lee, from your perspective, and
15 then I will ask Mr. Ruzal or Ms. Kosovych to respond from the
16 defendant's perspective.

17 MR. LEE: Yes. Thank you, your Honor.

18 On the plaintiff's side, I don't think so. I mean,
19 the terms that we provided to the defendants are kind of black
20 and white and so they either are accepted or they aren't, and
21 they haven't accepted it so we are prepared to move forward.

22 THE COURT: Okay. Let me ask from Mr. Ruzal for the
23 defendant's perspective, or Ms. Kosovych.

24 MR. RUZAL: Thank you, your Honor.

25 MS. KOSOVYCH: Thank you, your Honor. This is Adriana

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1 Kosovych. I will kick it right off.

2 So, from defendant's perspective, we actually were in
3 negotiations, as your Honor is aware, for a pretty long time
4 beginning in July of last year, and then finally in late
5 December, early January, the parties actually reached a
6 settlement with the amount of consideration and specific
7 material terms to which both defendants and plaintiffs agreed.
8 We then embarked, of course, to prepare a long-form written
9 settlement agreement memorializing those terms. Before we
10 provided the draft settlement agreement to plaintiff your Honor
11 issued the order requiring that the parties submit the
12 agreement for fairness approval which required a series of
13 revisions to make sure that the agreement comports with the
14 requirements under *Cheeks*. We did that. And when we provided
15 the revised agreement to plaintiff's counsel, there was
16 essentially agreement on all material terms, save one; there
17 was dispute over one remaining term. Plaintiff returned
18 red-lined edits which we accepted all of them but that one
19 term. We went back and forth and finally we provided a revised
20 version as a counterproposal on that one term and that's when
21 plaintiff's counsel basically blew up the deal and provided a
22 version of the agreement from which plaintiff's counsel
23 eviscerated all of the material terms of the agreement that had
24 previously been agreed.

25 In a last good faith effort, prior to this conference,

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1 to try to resolve the dispute over the one remaining term, we
2 sent back a further updated agreement in which we actually sent
3 the revisions that plaintiff's counsel had sent us -- meaning
4 we accepted all of their edits -- and, nevertheless,
5 plaintiff's counsel said, no thank you, we no longer wish to
6 settle on the terms that we had agreed before.

7 So, that is kind of what -- from defendant's
8 perspective, we certainly remain interested in resolving this
9 matter, we thought we had a deal. We believe that the material
10 terms were all agreed on but that one and we were willing to
11 give and to concede on that one term. So, you know, if we had
12 our druthers, we want to move forward with the settlement
13 agreement that we thought we had agreement on.

14 THE COURT: Let me ask this, Ms. Kosovych. That one,
15 the term that you are referring to, was that an issue of
16 consideration or some other term that was part of the
17 agreement?

18 MS. KOSOVYCH: No, your Honor; it had nothing to do
19 with the amount of consideration. The consideration was
20 accepted in January and has remained the same throughout, nor
21 does it have to do with the release that was also agreed on, it
22 was a different term.

23 THE COURT: Okay. So let me ask, Mr. Lee, I assume
24 that the agreement was, in terms of the acceptance early on,
25 was something that was agreeable to your client. What is it

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1 that transpired here other than perhaps -- well, let me ask,
2 what is it that transpired here?

3 MR. LEE: Thank you, your Honor.

4 So, basically, defendants originally had put all sorts
5 of onerous terms into the agreement and they maintained and
6 insisted on additional onerous non-monetary terms and so we
7 weren't comfortable with it. And so, I mean, there is more
8 towards -- look. If they had the kind of Bloomberg form,
9 right, and get a release, right, and they pay, like that would
10 have been fine, that's what we are comfortable with, but they
11 sent back something that was -- I can't remember how many, like
12 10, 15 pages long, right, with all sorts of covenants and
13 representations and all kinds of obligations including asking
14 my firm to limit our ability to represent other lawsuits for
15 them which I think is an unethical request and I told them
16 that. And they insisted on including other onerous terms and
17 so we don't want to deal with it. I gave them numerous
18 opportunities to revise and they refused and I just don't
19 understand why, if they refused, why we have to take their
20 additional terms that are onerous and unacceptable.

21 THE COURT: Well, let me ask this. What I am hearing
22 and what I don't quite understand, if the terms are in fact
23 onerous and some of those terms, to the extent they're onerous
24 may not necessarily -- and I am not in any way, since I don't
25 know the terms I am not in any way opining on this, but may not

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1 necessarily be consistent with *Cheeks*. Having said that, if
2 the onerous terms are not, don't directly impact the clients
3 you currently represent, I just don't know -- I don't know
4 enough to enter into the consideration remains the same, in
5 other words amount of money that the clients are going to be
6 receiving and it is the other terms, wouldn't the assistance of
7 a magistrate judge in particular, who is familiar with how the
8 *Cheek* settlements, settlements in the FLSA cases typically run
9 out, wouldn't the assistance of a magistrate judge be helpful
10 to at least try and see if the parties could resolve the
11 issues? But, from what I heard Ms. Kosovych indicating, is
12 that with regard to the latest draft submitted by your firm,
13 Mr. Lee, they indicated they accepted all of the revisions.
14 So, I don't know, were there still other terms that were left
15 open or were you unaware that they had accepted whatever the
16 most recent draft that was settled into the agreement was that
17 your firm had sent over?

18 MR. LEE: Thank you, your Honor. It is C.K. Lee for
19 the plaintiff.

20 So, I did receive correspondence that they said that,
21 to that effect, but I don't -- I looked at what they revised
22 and it was not what my markup was and so I don't think
23 they've -- I can double check, but my understanding is they did
24 not revise their agreement based on my revisions based on my
25 adamantly requested revisions.

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1 MS. KOSOVYCH: Your Honor, if I may?

2 THE COURT: Yes.

3 MS. KOSOVYCH: May I clarify a couple things?

4 So, first, I want to make clear that the version of
5 the agreement that we accepted was a version that was sent to
6 us and this is just for purposes of making the distinction
7 easier, a version of the agreement that was sent by two other
8 attorneys at Mr. Lee's firm on Friday, April 30th. That
9 version of the agreement we agreed to and we had just one
10 minor, non-substantive point that we needed clarification on
11 from the plaintiff's counsel. The version that Mr. Lee is
12 referring to that he is saying we did not accept is a version
13 that he sent us on Sunday, May 2nd, which was a handwritten
14 markup, literally Xs through wholesale terms that were no
15 longer under discussion for at least two months, they had been
16 accepted and, mind you, some of which were accepted in January
17 at the outset of plaintiff's agreement to settle for the offer
18 that we had offered for the amount of consideration that we had
19 offered. So, Mr. Lee is referring to the version that took out
20 the bulk of the agreement that we already had.

21 With respect to Mr. Lee's statements that we were
22 putting in onerous provisions, some of which violated rules of
23 ethics because they limited his firm's ability to represent
24 other clients, I must correct the record, neither of those
25 statements is true.

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1 First, the terms that we had in the settlement
2 agreement are exactly the same as terms that we had used
3 previously and exactly the same form agreement that we had used
4 previously with Mr. Lee's firm with Mr. Lee in other matters.

5 Secondly, the one term that he called unethical did
6 not in any way limit his firm's ability to represent other
7 clients. All it did was seek a representation from Mr. Lee's
8 firm as to who they were currently representing now in
9 connection with claims or potential claims against defendants
10 which, you know, to us doesn't violate any rule about this. It
11 doesn't limit representation, it just asks for a representation
12 as to current representation and, you know, just like I said
13 before, we did agree to his revision to that one term, so.

14 THE COURT: All right. This is what I am going to do.
15 Although typically I don't force parties to go to a magistrate
16 judge, I think in this instance where there is so much back and
17 forth, I would like to have Magistrate Judge Aaron meet with
18 the parties, get the history of what has transpired to see if
19 the gap, whatever it may be, could be bridged. Based upon what
20 I am hearing today and the correspondence that I received, I do
21 think it is worth at least an attempt to have Judge Aaron
22 assist the parties in that way and so that's what I am going to
23 do. I will indicate to Judge Aaron that I will advise him that
24 it is prior to receiving submissions from the parties, or
25 simultaneously, that he should also obtain a transcript of our

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1 conversation here today. I do think that it may not work and
2 that's fine and I am in no way forcing, knowingly suggesting
3 that one side or the other should accept or be forced to accept
4 terms that they believe are unacceptable in the agreement but,
5 in light of what's been said concerning the consideration that
6 would be received by plaintiffs and the timeline of the
7 negotiations, I think that Magistrate Judge Aaron could be of
8 use. So, I am going to --

9 MR. LEE: Your Honor, I'm sorry. This is C.K. Lee.
10 Instead of Judge Aaron, I know the Court had initially provided
11 the option of using the panel mediators and I think scheduling
12 a panel mediator may be faster than using Judge Aaron. Is that
13 something the Court could consider instead?

14 THE COURT: Well, let me hear from defense counsel
15 about that and then I will weigh in.

16 Mr. Ruzal or Ms. Kosovych? Ms. Kosovych, do you want
17 to, since you were taking the lead, do you want to address
18 that?

19 MS. KOSOVYCH: Sure, your Honor.

20 I don't think our client would be amenable to engaging
21 in mediation through the panel because we believed that we had
22 an agreement. I think if the Court is inclined to order the
23 parties to do anything, I think we would prefer to meet with
24 the magistrate judge for the sole purpose of resolving the
25 dispute over the remaining term. I also would say that in my

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1 client's view, regardless of whether it is with the magistrate
2 judge or speaking before a panel mediator, any further
3 discussion of settlement would certainly not include any
4 renegotiation of the amount of consideration or the other, you
5 know, terms. In our view, it should be solely over the dispute
6 of one term.

7 THE COURT: Okay. All right. What I will say is the
8 following: With regard to magistrate judge versus the
9 mediator, my inclination is to have Magistrate Judge Aaron
10 handle this. With regard to what is on the table in terms of
11 within the purview of Magistrate Judge Aaron, I understand,
12 Ms. Kosovych, your position and the position of your client,
13 and I imagine that Mr. Lee may have similar with regard to his
14 client, but I'm not going to tie Judge Aaron's hands in sort of
15 wading through what has transpired here. I do think it makes
16 sense to have a magistrate judge handle this because it seems
17 to me there may be legal issues and, in fact, although
18 Ms. Kosovych you haven't said this, it is implicated in your
19 comments that, from your client's perspective, there is a deal
20 and you haven't said that you moved to enforce whatever that
21 deal is because everything was in place except for final
22 written documents. And although, not something that typically
23 we see, I suspect that there is a possibility that that might
24 be something that might be -- a motion that might be made. And
25 I am not in any way saying you should make a motion -- I have

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1 got no idea -- but I want to attempt to circumvent any further
2 motion practice or litigation.

3 Look. I don't have a problem passing the case but
4 under the circumstances presented to me, I would like pledgee
5 Aaron to take -- to make an effort to see if he can bridge the
6 gap, whatever that gap may be, or whether he can help the
7 parties reach a resolution. Obviously if either party doesn't
8 want to change the terms -- and I understand, Ms. Kosovych,
9 from your client's perspective the consideration was what
10 they're willing to offer, but I'm not going to limit Magistrate
11 Judge Aaron in terms of what he thinks might be appropriate in
12 terms of managing of the matter in terms of a conference with
13 regard to settlement. And what would I say is, obviously,
14 everyone should present their points in advance of meeting with
15 Judge Aaron and, as I indicated, I will suggest that he receive
16 a copy of the transcript of this proceeding in advance of
17 having you either on the phone or, if possible, in person or
18 for any session, any settlement session.

19 So, I am going to do the referral to Judge Aaron and
20 direct that the parties go to see him under the unique
21 circumstances that have been presented to me in this matter.

22 There is another issue that I had raised internally
23 with my law clerk but I just wanted to make the parties aware
24 of something, or at least delve into something that I don't
25 believe is an issue but the parties should be aware of it. Let

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1 me ask either Mr. Lee or Ms. Kosovych, the entity FedCap
2 Rehabilitation Services, Inc., do they provide staffing to the
3 federal government and specifically to the court houses, and
4 specifically for a janitorial or cleaning staff? Do either of
5 you know the answer to that?

6 MS. KOSOVYCH: I'm sorry, your Honor. I don't know
7 that but we can inquire.

8 THE COURT: The only reason why I raise it is I know
9 the folks who provide those services, janitorial and cleaning
10 services to the federal court house and I believe also to the
11 U.S. Attorney's office, are known as FedCap workers and I don't
12 know whether it is the same company or not. But I thought I
13 would raise it with the parties just so that you are aware.
14 Again, I don't think it necessarily matters but I think the
15 parties should just be aware of that, and I also don't know
16 whether it implicates the proposed class here or not but I
17 thought the parties should be aware of it. And if you can
18 discuss it between yourselves and with your client, it may be a
19 different entity but it may be the same entity but I just
20 thought I would raise it.

21 Okay. Let me ask, is there anything else that we need
22 to discuss today? Mr. Lee?

23 MR. LEE: Nothing on the plaintiff's side. Thank you,
24 your Honor. I appreciate the Court's courtesy and patience.

25 THE COURT: Sure. No, not a problem.

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Anything else, Ms. Kosovych? Mr. Ruzal?

MS. KOSOVYCH: Actually, your Honor, I did have a question. You suggested that the parties should submit their respective positions to Magistrate Judge Aaron in advance of whatever scheduled conference we have. I just wanted to clarify that should we, you know, we are typically of course very reluctant or cautious, I should say, about submitting settlement discussion materials or draft a settlement agreement to the Court so what type of information or what type of disclosures was your Honor referring to?

THE COURT: Well, I was thinking about leaving it up to the parties. I do understand the reluctance of submitting those things to a court because it, you know, technically they can't be used in terms of litigating the case at a later time frame. I don't know to what extent there is going to be or there was consideration on defendant's part of motion practice relating to the fact that you believe you had a deal which I think would require that sort of an exchange. I know typically Judge Aaron, I think this is an a typical situation so that Judge Aaron typically wouldn't -- that is something that he, I would imagine, doesn't get in any other cases because it is usually -- it is usually to, although settlement discussions may have occurred, they haven't been in this posture. So, I'm not requiring, Ms. Kosovych, for you to submit drafts and the like. I would leave it up to counsel to decide what they

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1 believe is appropriate. If they believe it is not necessary to
2 provide drafts but you can provide a narrative in a letter or
3 submission to Judge Aaron, that's up to you and I would leave
4 it up to the parties. I am not in any way directing that you
5 are required to submit drafts or the exchange of e-mails. I
6 will leave it up to you as to what you believe was both
7 consistent with your representation of your client and also
8 efforts to try and then move the ball forward in terms of the
9 settlement itself.

10 MS. KOSOVYCH: Thank you, your Honor.

11 THE COURT: Okay. All right. Let me ask, and I don't
12 believe, did I ask Mr. Lee, is there anything else from the
13 plaintiff?

14 MR. LEE: Nothing from the plaintiff except I will add
15 my perspective is I absolutely believe that the agreement is
16 public and we will be filing our revisions that we have
17 suggested to the defendants on the Court docket for Judge
18 Aaron.

19 MS. KOSOVYCH: Oh.

20 THE COURT: Well, I think there is a separate thing
21 there, Mr. Lee. I mean, basically saying you are going to file
22 something on the Court docket means it is going to be public
23 and since you haven't yet reached a settlement, that is
24 something that I won't permit to you do. It is one thing if
25 you want to submit something to Judge Aaron for his in camera

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1 review in connection with the settlement conference with him.
2 It may be that somewhere down the line there is some form of
3 motion practice that does result in an attempt to enforce
4 whatever the agreement is. Then I will have to determine
5 whether or not whatever gets submitted in connection with that
6 motion whether or not it should be public or not or it is
7 submitted in redacted form. But, in terms of just filing
8 things on the docket, I would, in terms of the drafts that went
9 back and forth, I would think that before doing that you need
10 to meet and confer with your adversary, come to some sort of
11 understanding, and if that understanding, you can't reach an
12 agreement on that, if it is referred to Judge Aaron, I will let
13 Judge Aaron decide that issue. But since those matters, drafts
14 are typically not something that are filed and it's one thing
15 if it is part of a motion, then arguably it becomes a court
16 document but I'm not sure, in terms of a settlement conference,
17 that that necessarily means that it would be. In fact, I think
18 some of the settlement submissions that are submitted in
19 connection with magistrate judge's conferences are done
20 confidentially. I'm not sure that, at least in my experience,
21 ever seeing those exchanges that may be provided to a
22 magistrate judge on my docket.

23 So, I will just leave the parties with that. And
24 before you do that I would ask that you, A, not just file it;
25 but, B, walk through what you intend to do with Judge Aaron so

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1 that we won't have a problem with things on the docket that we
2 later have to either only half of the parties review or to
3 strike from the docket later on.

4 MR. LEE: Absolutely, your Honor. I don't want to
5 prolong this unnecessarily. I know settlement discussions are
6 not admissible under 408 but I don't think they are
7 confidential and this is -- our discussions were not pursuant
8 to a mediation, a mediation had been over, so I'm not aware of
9 any confidentiality that I would otherwise be subject to. But
10 we would definitely adhere to any rules that Judge Aaron would
11 require.

12 MS. KOSOVYCH: Your Honor, if I may interject?

13 We actually entered into a confidentiality stipulation
14 specifically for the purposes of settlement requiring the
15 parties to maintain confidential all the information exchanged
16 and communications exchanged throughout the settlement
17 discussions starting in July. The confidentiality stip was
18 signed, I believe, July 22nd of 2020 and that has been in place
19 the entire time. We would strongly object to Mr. Lee's
20 publicly filing any communication, any information, and any
21 drafts of the settlement agreement that were exchanged
22 throughout the parties' discussions.

23 THE COURT: Okay. All right. As I indicated, before
24 any of that happens, Mr. Lee, you are to raise the issue before
25 Judge Aaron. I don't -- I am just looking at the docket right

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1 now. Ms. Kosovych, was that a stipulation that was filed with
2 me or was it something just between the parties?

3 MS. KOSOVYCH: I believe it was between the parties,
4 your Honor.

5 THE COURT: All right. So I do think that before
6 anyone files things like that, including the e-mail exchanges
7 and the like, that you consult with Judge Aaron, filed on the
8 public docket. Again, because I refer many matters to
9 magistrate judges for settlement purposes and I assume,
10 although I don't know because I -- well, what I can say is I
11 have never seen, on the docket, an exchange of letters setting
12 forth the parties' relative position on the settlement on the
13 public docket. Maybe I am missing something. But, regardless
14 of that, what I am directing the parties to do is before you
15 start filing things on the public docket, you raise the issue
16 with your adversary. If there is disagreement, then you raise
17 it with Judge Aaron for his input before you file things on the
18 public docket that relate to settlement. Okay?

19 MS. KOSOVYCH: Thank you.

20 THE COURT: Thank you.

21 MR. LEE: Thank you, your Honor.

22 THE COURT: And obviously, Ms. Kosovych, to the extent
23 there is a stipulation you can obviously, if there is a
24 dispute, make Judge Aaron aware of whatever agreements the
25 parties had previously had.

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1 MS. KOSOVYCH: Of course.

2 THE COURT: Thank you very much, everyone, for getting
3 on the phone. We will stand adjourned.

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